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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 193

SAMUEL FELDMAN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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IN THE

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UNITED STATES OF AMERICA.

PETITIONER'S REPLY BRIEF

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

The brief in opposition for the United States contains a rather lengthy alleged summary of the evidence developed at the trial. It justifies such departure from the issue of this appeal, which has been narrowly limited to the question of the proper admission of the New York supplementary proceedings examinations, by stating that it is necessary to set forth at some length the nature of the charges against the petitioner and the evidence adduced in support thereof in order to appraise the petitioner's contention in the light of the relation of the challenged testimony to the case.*

*Government's Brief, page 4.

The petitioner's main brief attempted to confine itself to the issue of law upon which the writ was granted and therefore did not treat of the facts of the case at any length.

As one reads the statement of facts which the Government presents as an alleged summary of the evidence one is led to wonder how any judge in the Circuit Court of Appeals could possibly, after some eighteen weeks' study of the record, have stated:*

> "'I feel I must say that, in my judgment, not only was guilt not overwhelming, but it was so doubtful that extreme care was needed to insure a fair trial.''

and again:

> ". . . I must express my fear that defendant was tried and convicted of general amoral conduct, rather than of specific intent to defraud by mail."

If, as the Government contends, a consideration of this case requires the setting forth at some length of the evidence adduced in support of the charges against the petitioner, the record will show that a full and fair statement of the facts has not been presented to this Court in the Government's brief in opposition.

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* Minority opinion R 56, 58.

The present printed record is in greatly abbreviated form. However, nine copies of the printed record in the Circuit Court of Appeals were supplied to this Court in connection with the petition for certiorari. That record, pursuant to the order, allowing the writ, is to be treated as though filed in response to the writ. By virtue of a stipulation between the petitioner and the Solicitor General, filed in this Court, reference to this record is permitted. In our references the present abbreviated record is designated as "R" whereas the record filed in behalf of petitioner's application for the writ is designated "CR".

The Facts

The petitioner had been a commission agent for many years (CR 1580). For a time he had been connected with the fur business and later with various Stock Exchange houses. He secured customers for furs upon a commission basis. His services and favors were also sought by stock brokerage firms which, because of petitioner's connections with moneyed interests, were most anxious to secure the lucrative business which he controlled (CR 728-0, 738, 746, 930-2).

At the trial a very substantial portion of the Government's testimony consisted of an attempt to prove the defrauding of one of those New York Stock Exchange firms, Stout & Co.,* whose partners were Messrs. Arthur Goetz and W. Hutton Miller.** These men, through their firm, had cashed for petitioner numerous checks drawn on the J. Feldman account at Petoskey, Michigan (CR 746). In most instances, the funds to cover the checks issued were obtained by the cashing of other checks with the same firm and wiring the proceeds to Petoskey, Michigan, for deposit. Petitioner was known to be a large business getter (CR 728). He had secured for the firm of Munds, Winslow & Potter, a prominent Stock Exchange firm, commissions as high as $150,000 in a period of some fifteen months (CR 1309). This was during the year preceding petitioner's association with Stout & Co., whose partners were well aware of his business-getting capabilities (CR 746, 930-2, 949). Among some of petitioner's accounts

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* Stout & Co. was named as a victim and as part of the alleged scheme to defraud in the bill of particulars furnished by the Government to petitioner prior to trial (CR 14z). Any contention that Stout & Co. is not a part and a main part of the alleged scheme to defraud should be viewed in the light of this state of the record.

** Referred to hereafter as Hutton Miller.

were those of Fred and Larry Fisher, millionaire financiers and executives of General Motors (CR 931, 1307-8).

Included in the services to be rendered by Stout & Co. to petitioner in return for his obtaining business was the cashing of the checks in question and the advancing of money to him (CR 740, 747, 749, 842). Direct payment of commissions would have been a violation of Stock Exchange rules (CR 741, 1387). Petitioner was unable to become a customer's man and receive commissions directly, in accordance with the rules, because he had judgments outstanding against him and the necessary approval of the Stock Exchange was thus quite unlikely. This was also the reason why petitioner did not have his own bank account but used his father's account. These facts were freely disclosed to Stout & Co. (CR 841-2).

It was then the practice of Stock Exchange firms to take temporary quarters in Florida during the winter season for the purpose of transacting business, mainly with the purpose of making permanent contacts and cementing relationships with old customers (CR 1310-11). For example, petitioner had been active in Florida on behalf of Munds, Winslow & Potter, a New York Stock Exchange firm, during the winter season of 1937-1938. After discussions between petitioner and the partners of Stout & Co. in the fall of 1938, they decided that petitioner would similarly act for Stout & Co. during the winter season of 1938-1939 (CR 949-951).

At Stout & Co.'s request, petitioner arranged for stock brokerage facilities at Miami Beach, consisting of three separate apartments on the boardwalk (CR 952). One was used as the main brokerage office of Stout & Co.; another, adjoining, but with a separate entrance, was used as petitioner's private apartment and as an exclusive suite for certain selected, important customers who did

not wish to transact their business in the main office (CR 938, 1432-1438). In these private quarters Stout & Co. installed a Translux (a modern projectionlike ticker tape arrangement) (CR 787, 935). There was an interconnecting telephone system direct to the main office next door for placing orders and obtaining market reports. Meals were prepared by a cook engaged by Stout & Co. and served to these special customers (CR 955, 1436). Petitioner was supplied with a car and chauffeur by Stout & Co., in addition to his room and board (CR 955, 1436, 1439). The third apartment, above the offices, was occupied by Hutton Miller and his wife during the winter season (CR 1433). Hutton Miller acted as the resident-partner of Stout & Co. in Florida for the winter season and petitioner's activities were under his direction.

When petitioner first became connected with Stout & Co. in New York (prior to the Florida season), his business was handled through a branch office at the Hotel Pierre (CR 747). A bank account was maintained by Stout & Co. at the branch of the Bank of New York near the Pierre Hotel, mainly for the accommodation of petitioner in the cashing of his checks (CR 740, 928). After a time, petitioner's business was transferred to the main office where it was handled directly by the partners, Messrs. Goetz and Miller. (CR 748, 784). About November of 1938, the advances of Stout & Co. to petitioner through the cashing of checks had reached the amount of some $12,000. Stout & Co. then paid petitioner $12,000 so that the outstanding checks could be cleared (CR 784-5).

The check-cashing accommodation continued after that payment (CR 785). By the end of December, the amount advanced to petitioner had again reached a sub-

stantial sum (CR 786). Petitioner then went to Miami Beach to participate in Stout & Co.'s winter business season (CR 785). He left with Arthur Goetz, senior partner of Stout & Co., a batch of checks signed in blank by J. Feldman, payable to the order of Sam Feldman, and endorsed by him. Goetz, from time to time, in New York City, in petitioner's absence, filled in amounts and dates, cashed the checks and wired the money forward to Petoskey, Michigan, for deposit to cover checks petitioner had previously issued and which had not yet cleared. Goetz wired forward almost every day the sum of $6,000, after having first filled in and cashed Feldman checks in that amount (CR 795-9) and Stout & Co. paid the Western Union charges for this service.

After petitioner had been in Florida some time, Stout & Co. wired sufficient funds to him in Miami to cover the checks cashed in New York, and then en route to Michigan (CR 785). Petitioner wired this money from Florida to Michigan and further check cashing was then handled directly by petitioner and the Stout partner, Hutton Miller, at Miami (CR 795, 785). The advances during petitioner's association with Stout & Co. had reached $36,000 by this time (CR 794). Inasmuch as petitioner had and could have no official connection with Stout & Co., it was then arranged that he give Stout & Co. a note for $36,000, payable to the father of Hutton Miller, one Royal Miller, who had no connection with the transaction at all (CR 969). Obviously the matter was handled in this manner so that the firm's name would be kept out of it.

While petitioner was in Florida, he would give the checks to Dornbach, the chauffeur (CR 1446-7), to take to the resident partner, Hutton Miller, for the Stout & Co. endorsement. Dornbach would then cash the checks at the Miami Beach Bank where Stout & Co. had its account

(CR 1441-3). At times the entire proceeds of the checks would be wired forward to Petoskey, Michigan, and, at other times, only part would be wired and the balance returned to petitioner in cash. Hutton Miller was fully aware of the exact nature and purpose of the check cashing (CR 1421-3).

After petitioner returned to New York, a few days before the Stout & Co. office closed for the season, there was outstanding and en route to Michigan a substantial amount of checks to be covered. For this purpose, petitioner left checks signed in blank with the Stout & Co. Miami office (CR 1445-6). The resident partner, Miller, and the manager, Landau, filled in the amounts and wired the money to Michigan in petitioner's absence (CR 1440-45). On one occasion, because of the large amount involved, the Miami Bank refused to cash petitioner's check. However, Miller and Landau with the bank's consent, arranged to effect the same result by cashing two checks aggregating the amount represented by the first check (CR 1444-5).

Goetz, the partner who had remained in New York, later used threats to force Miller personally to assume the resulting loss to the firm in order that the Stock Exchange might not become aware of the firm's activities (CR 923-5). Despite this precaution, an investigation was subsequently conducted by a committee of the Stock Exchange (CR 934-5). During the course of this investigation, the committee found that petitioner enjoyed many unusual services from Stout & Co., including the check-cashing privileges. Both Goetz and Miller were severely censured. The language used by the committee is direct refutation of the Government's theory, viz., that Stout & Co. was a victim (CR 958), for the committee, saying that more serious action

was not taken because the public had not been hurt in any way, added:

> "The Committee wishes to make it very clear to you, Mr. Miller, that they consider the practice that you allowed to go on in your office to be, to say the least, most reprehensible. This is the sort of practice that we will not tolerate and we mean to stop it." (CR 957-8)

From the testimony of the Government's own witnesses therefore, it is apparent that petitioner's check cashing activities were part of a business arrangement with Stout & Co. That firm's full knowledge and awareness, as well as its active, knowing participation in the transaction for their own business ends, remove from these transactions any semblance of fraud as to this alleged victim.

Essex House Transaction

The rest of the Government's case of an alleged scheme to defraud consisted of another incident commencing in January, 1937 and ending in August, 1937. This transaction bore no relationship to the Stout & Co. matter, and, in fact, occurred well over a year prior thereto.

In the Essex House transactions, the Government's statement of facts would convey the impression that petitioner, a stranger, sauntered up to the desk of the hotel, cashed a large check and then continued almost daily to cash his checks there until, over a period of a few months, he received some $800,000 thereby. It is apparent that the underlying basis of the dealings between the petitioner and Essex House has been omitted from the Government's statement. In 1937, petitioner was a tenant at the Essex House (CR 520). Obviously neither petitioner nor any other guest could have cashed checks in the

amount of $800,000 at the hotel over a period of seven months if the relationship existing between the hotel and the defendant were merely that of innkeeper and guest.

The cashing of the checks occurred with the consent of the hotel's credit manager, who was not charged in any way with being an accomplice; he was personally familiar with the petitioner's practice of wiring money forward to cover checks previously cashed (CR 459-460). Petitioner had done business favors for the Essex House and was, in fact, personally friendly with and had made check cashing arrangements with its operating trustee (CR 556-557). The management, at the very time of the check cashing, was fully aware of petitioner's poor financial condition (CR 626-8, 632-3). The top ranking officials of the Essex House were not unaware of the purpose for which the checks were being cashed by petitioner (CR 508, 556-7). Even Western Union knew that petitioner's checks were being cashed to provide funds to cover previously cashed checks (CR 377). The Government's witness Erb (alleged to be a victim) himself wired forward money to meet such checks and signed the petitioner's name to the money orders (CR 401). Most significant is the fact that the impressed fund maintained by the Essex House for the purpose of cashing checks of guests was $7,000 higher than generally required for its normal purpose—this, in order to accommodate the defendant (CR 1281-2).

It is not surprising therefore, that Judge Clark, in his dissent below, stated that affirmative evidence of knowledge of the alleged victims was strong and then wrote:

> "Certainly agents of the Essex House had it (knowledge) and the only question here is how far the higher-ups in that organization remained in ignorance notwithstanding the sizeable amounts of these daily transactions." (Matter in parenthesis ours.) (R 56-57)

The Government, in its brief in opposition to the application for the writ herein, tried to have it appear that the "discovery" by the Essex House of the petitioner's check "kiting" activities occurred in August, 1937, and that, thereupon, they stopped the further cashing of checks. Petitioner pointed out in his reply brief that such a claim was misleading, and the Government in its present brief no longer makes such claim. The Government had no choice but to abandon this allegation for the record clearly indicates that, before and throughout the entire period of time that Essex House was cashing the petitioner's checks, it was the holder of an unsatisfied and uncollected judgment against the petitioner for room rent and services, and that it had been unsuccessful in its attempt to collect from the petitioner even that small judgment (CR 626-640). The fact is that the Essex House refused to continue the accommodation of check cashing to the petitioner only after there had been a change in ownership and management (CR 492). At that time the petitioner was requested to take care of the outstanding checks, which he did, and the Essex House did not incur any loss in these transactions (CR 500).

In brief, the record is replete with testimony adduced by the Government itself that there was not the slightest effort by the petitioner to conceal his intent and purpose from any one connected with Essex House. In fact, the Government's evidence affirmatively shows that Essex House, through its credit manager, its operating trustee and everybody in authority, willingly and knowingly participated in and aided the "kite" by cashing additional checks and wiring forward moneys to meet checks which they had previously cashed.

Reynolds Transaction

At the trial, the Government tried to establish an alleged fraud in the borrowing in 1937 from one Edwin S. Reynolds, Jr., of $32,000. The Government's position, apparently, is that there was fraud involved inasmuch as Reynolds had sent petitioner checks in blank drawn on Reynolds' bank account and petitioner had, after filling in the amounts, cashed the checks. Reynolds was named as a victim and was not in any way indicated to be an accomplice (R 5-7; CR 14z). Petitioner had cashed these checks with Reynolds' knowledge and consent (CR 1318-20). Petitioner believed Reynolds, the president of a prominent mid-western corporation, to be a wealthy man who dabbled in the market as a diversion and lived in luxurious fashion (CR 597, 1315-1316).

The return of the Reynolds checks for lack of funds came as a surprise to Feldman. In fact, before Reynolds' checks were cashed for petitioner by the stock brokerage firm of Munds, Winslow & Potter, Mr. Allen, its managing partner, communicated with Reynolds at Dayton, Ohio (CR 1318-20). Reynolds was informed of the amount of the checks and was told that petitioner was to be given the cash (CR 1318-20). The transaction was not completed until Reynolds had said it was all right to go ahead (CR 1319). Feldman gave two promissory notes to cover the money advanced by Reynolds (Exhibits 86 and N; CR 1850-1; 1624-5). One note for $12,000 was subsequently paid by petitioner who received the note back (CR 1410-1), and payments were made on the other note (CR 1414-6). Although petitioner was alleged to have defrauded Reynolds, the proof showed that petitioner and Reynolds remained warm friends to the time of Reynolds' death and petitioner was regarded as one of Reynolds'

closest intimates (CR 1414, 1416-7). Reynolds himself, as opposed to the Government's contention of fraud, had stated on occasion that the entire transaction was a loan (CR 1414).

With respect to the Reynolds transaction, Judge Clark stated:

> "As to Reynolds, defendant appealed to him for checks signed in blank, in order to get out of the jam he was in, and Reynolds naively complied. What would he have signed the checks for except that they might be used to bolster defendant's shaky financial condition? Perhaps, here, too, there was evidence for the jury, although it points more in the direction of a violation of agency instructions than an intent to defraud by mail. At any rate, the evidence being thus equivocal, errors in the trial become the more important." (R 57)

The record is abundantly clear that the Reynolds transaction involved no fraud of any kind. It was merely the case of an advance of money to help out a friend. That this attempt created hardship for the volunteer certainly did not make the petitioner's conduct fraudulent.

Appraisal

If this Court is to appraise the petitioner's contention of reversible error by virtue of the admission of the many supplementary proceedings examinations of the petitioner in the State of New York in the light of the evidence adduced at the trial, it becomes apparent that an analysis of the testimony adequately justifies the doubts of the dissenting Judge below as to whether there was any defrauding at all or even an intent to defraud (R 58). At any rate, by virtue of that status of the record, it is not surprising

that one judge of the Circuit Court below cautioned as to the extreme care that was needed in order to insure a fair trial (R 56), and the contention of reversible error must be viewed in the light of that situation.

Argument

The spectre of *stare decisis* to which the petitioner referred in his main brief (p. 29) as hovering over the parties in the case, as well as over the courts which have considered it, apparently still casts its heavy shadow upon the Government. Nowhere in the brief for the United States do we find any attempt to penetrate to the heart of the constitutional problem involved and to consider the scope and effect of the Fifth Amendment as determined by its language, its historical background and the public policy which justifies its existence. From a study of the Government's brief alone, one would almost be forced to conclude that the privilege against self-incrimination portion of the Constitution sprang from nowhere, without paternity and without reason. The Solicitor General has not seen fit even to dignify by reference the decades of struggle and tribulation in England and America which finally gave birth to the privilege of self-incrimination and to its inclusion among the first ten amendments to the United States Constitution.

Moreover, well over half of the brief of the United States is devoted to an earnest and determined effort to persuade this Court to avoid any ruling on the basic constitutional question herein involved. It urges that the decision below must be affirmed because the objectionable evidence, admitted in violation of the petitioner's constitutional rights, was non-incriminating, cumulative and non-prejudicial. One may well question the assumed confidence

of the Solicitor General in the strength of his position when he finally, near the end of the brief, does discuss the real question involved, in view of his determined effort to avoid any consideration of that problem.

The Solicitor General again has, just as in opposing the application for a writ, abandoned the previous reasoning advanced by the United States Attorney below and by the majority of the Circuit Court of Appeals below. While the Solicitor General eagerly accepts the result, he is quick to reject the reasoning and attempts to justify it in other ways. For the purposes of his argument, he divides the supplementary proceedings in question into those taken prior to March of 1938 and those subsequent to March of 1938 and attempts to defend the admission of each group separately.

The Supplementary Proceedings Examinations Subsequent to March of 1938 were Incriminating and Prejudicial

With respect to the five supplementary proceedings examinations taken subsequent to March of 1938, the Government sets forth the proposition that the incriminating character of the petitioner's testimony must be determined in the light of the conditions existing at the time the testimony was given (see pp. 26-27). It is thereafter assumed that an acceptance of this axiom must result in the deterioration and ultimate collapse of the petitioner's contentions. As a matter of fact, an analysis of the record in the case at bar conclusively shows that, applying that particular test to the supplementary proceedings examinations taken after March of 1938, there can be no question that they were highly incriminating, inflammatory and prejudicial.

It is not intended to discuss here all of the cases cited by the Government at pages 27 to 28 of its brief in footnotes 30 and 31, wherein the tests of when testimony be-

comes "incriminating" are discussed. In petitioner's main brief (p. 22), the rules as to "incriminating" testimony are sufficiently set forth to obviate their repetition herein. However, petitioner is unable to proceed with an analysis of the facts and a consideration of the axiom contended for by the Government without calling the attention of this Court, in passing, to the case of *People ex rel. Bekoris v. Truesdell,* 259 App. Div. 1091 (2nd Dept., 1940) (cited in footnote 31 of the Government's brief). In that case, the New York court held that the examination of a defendant before a Grand Jury and the elicitation from him of his *name* and *address* did not constitute sufficient incrimination to warrant the immunity statute coming into play. If the type of evidence adduced in the supplementary proceedings in the case at bar be of the type of the testimony in the *Bekoris Case,* it would indeed be wasteful and futile for this petitioner to proceed any further; and, likewise, if the Government must rely on cases of that type for precedent in the instant case, they must indeed be sorely put to sustain their position.

A very substantial portion of the prosecution's proof at the trial of the case at bar consisted of transactions of the petitioner with the stock brokerage firm, Stout & Company, from September 1938 to April 1939. Stout & Company was named as a victim in the bill of particulars (CR 14z). Nevertheless, the Solicitor General seeks to find comfort in arguing that, since the mailings alleged in the indictment occurred in 1937, the Stout testimony was not actually part of the crime charged, but went to the question of the petitioner's intent to defraud (see p. 32, Government's brief). However, the United States Attorney in the trial court below, on summation, admitted that Stout & Company was a victim of the very scheme charged in the indictment (CR 1467-8). The prosecutor also asserted

that Stout & Company was one of the few victims as to whom evidence had been offered at the trial (CR 1501). Besides, it is not necessary that there be a mailing for each and every part of a scheme to defraud; it is sufficient that there be at least one or more mailings in furtherance of that one scheme.* Finally, whether it be part of the scheme to defraud or a similar offense to show intent, the Stout testimony comprised approximately 300 pages of the record (CR 712-984; 1012-1026; 1030-1033) and involved the alleged kiting of some $600,000 worth of checks,** which resulted in a loss of $81,500 to Stout & Company.*** The prosecutor dwelled upon the Stout & Company situation in summation (CR 1467-68) and the trial court, in its charge to the jury, singled it out for specific comment (CR 1483-84). Under those circumstances, if error occurred with reference to the Stout & Company proof, it cannot be lightly brushed aside at this date.****

In that portion of the case dealing with Stout & Co., the prosecution undertook to prove that the petitioner cashed checks in New York and Florida drawn on the

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* "The theory upon which the indictment in the court below was drawn was that there was but one scheme, which was to obtain money by fraud in connection with the building contract. . . . The fact that the mails were employed in executing a part of the scheme immediately after it was devised and at various times before the entire scheme was completely devised is no defense under the statute." *Weiss* v. *United States*, 122 F. (2d) 675, at p. 681 (C.C.A., 5th, 1941), cert. denied, 314 U. S. 687 (1941); see also *Durland* v. *United States*, 161 U. S. 306 (1896), at p. 315; Cf. *Nash* v. *United States*, 229 U. S. 373 (1913).

** This information appears in Exhibit 103 which was not printed in the record of the Circuit Court filed with this Court in behalf of the application for a writ of certiorari, but was filed separately by photostatic copy with the duly certified transcript of the proceedings below which accompanied the petition and which, under the order allowing the certiorari and the stipulation filed between the parties, may be referred to in this review.

*** This is to be compared with no financial loss in the case of the Essex House and a financial loss of approximately $20,000. in the case of Reynolds, the other two victims.

**** Especially is this so in view of Judge Clark's dissent in the Circuit Court below in which he expressed his doubt as to the guilt of the defendant, and therefore cautioned as to the extreme care that should be exercised with reference to possible errors (R 56-57).

Petoskey Bank in Michigan, subsequently covered them by cashing additional checks and wired the funds received from the later checks to the Petoskey Bank to cover the earlier checks and that, at the time the checks were being cashed by the petitioner, he was without funds or power to pay or meet them.

The proof of the financial condition of the petitioner at the time of the cashing of the checks was most important on the question of fraud. A specific allegation in the indictment was directed to a lack of funds or power to meet the checks cashed (R 2).* The majority opinion in the Circuit Court below emphasized the fact that the cashing of checks becomes a scheme to defraud "when the maker knows that he has no prospect of paying the checks" (R 47). Again later, the majority stressed the fact that checks were presented to be cashed, petitioner knowing that he did not have the financial means to pay them (R 47).

The supplementary proceedings examinations subsequent to March of 1938 were used to prove, among other things, this vitally important fraud requirement that, at the time the petitioner was presenting checks to Stout & Co. for cashing, he was without funds or power to meet them. Thus, in the examination of the petitioner taken under oath on October 6, 1938 by virtue of subpoena petitioner testified that he had no bank account (R 22), no brokerage account (R 23), no customers' accounts (R 23), no money due from customers (R 23), employed no one either at home or in business (R 25), had no charge accounts (R 26), owned no automobile (R 25), was owed

* Paragraph "(3)" of the indictment alleged that the defendant would cash checks by presenting them to the Essex House "and to others to the grand jurors unknown" (R 2). A bill of particulars thereafter identified Stout & Co. as one of those who cashed checks for the petitioner and thereby became a victim of the scheme (CR 14cc-dd, 14n and 14z).

money by no one (R 25), was in arrears on his rent (R 26), and that, when rent was paid, his father paid it (R 22). Yet during this very period of time, the petitioner was cashing hundreds of thousands of dollars worth of checks with Stout & Co.*

In the supplementary proceedings examinations taken on December 16, 1938, the petitioner testified under oath that he had been subsisting on moneys sent by his father (R 14), that he had no brokerage account and had not had one for years (R 15-16), and that, between his previous examination in October 1938 and the examination in December, he had only $25. or $50. to live on, which he had gotten from his father (R 16). At that very time, the petitioner was cashing checks with Stout & Co. at the rate of $6,000. a day.**

During the period from September 1938 to April 1939, the petitioner steadily presented checks to Stout & Co. for cashing, totalling almost $600,000. Further supplementary proceedings examinations subsequent to March 1938,*** admitted in evidence in the court below, showed that he had been unemployed for many years (R 33); had no place of business (R 33); was owed no money by anyone (R 35), had no source of income from October 1938 to September 1939 except borrowings from his father (R 28)****; had no brokerage account for over two years (R 29); had no safe deposit box (R 30); had bought no clothes for two years and those last bought had been paid for by his father (R 28); and that, in his income tax return for 1938, he listed no earnings (R 35). Thus,

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* See Exhibit 103, referred to in second footnote on p. 16, *supra*.

** See pages 31-32 of Exhibit 103.

*** Those of July 20, September 6 and September 29, 1939 (R 16-21, 27-31, 33-35).

**** At another point in the record, it was shown that his father himself was overdrawn (CR 1205) and was financially unreliable (CR 74).

through the petitioner's sworn testimony in supplementary proceedings taken after March of 1938, the Government endeavored to prove a vital part of the Stout & Co. fraud, the lack of funds and power in 1938 and 1939 to meet the checks presented to them to be cashed.* The judge and prosecutor in the trial court justified the admission of the testimony on the ground that it went to the petitioner's financial condition during that period (CR 1236-7, 1241).

Moreover, the supplementary proceedings examinations subsequent to 1938 were used to show that money was wired forward for deposit in the Petoskey Bank account (R 30) and that checks from that account were being *mailed* from Michigan to New York during the Stout & Co. period (R 24, 29).** Finally, these examinations subsequent to March of 1938 were employed to show the petitioner's relations with Stout & Co. in Florida (R 16-19), during which sojourn he continued his check cashing activities with them.***

Thus, there was wrung from the petitioner's lips in the various supplementary proceedings examinations in 1938 and 1939 admissions that he was receiving checks, cashing checks, wiring the funds forward, all this at a time when he was without funds or power to meet or pay them. These supplementary proceedings were conducted during and

* If the petitioner had had power or funds to meet the checks, there would have been no fraud (Cf. *People v. Nibur*, 228 App. Div. 233, 234 (1st Dept., 1933); *People v. Humphries*, 226 App. Div. 500, 503 (1st Dept., 1929)).

** Thus, even the element of mailing was contained in the supplementary proceedings examinations admissions. Furthermore, the depositing or cashing of the Michigan checks in New York resulted in their being forwarded by mail by the New York banks to Michigan for clearance. This mailing alone was sufficient to bring the petitioner within the scope of the mail fraud statute (see *U. S. v. Weisman*, 83 Fed. (2d) 470 (C.C.A., 2nd Cir., 1936)). Certainly, the incriminating nature of that evidence when given can hardly be doubted.

*** In answer to an objection to the admission of this evidence, the United States Attorney specifically offered it as admissions of the facts (CR 1272).

with reference to a period of time when the petitioner was actively, allegedly "kiting" some $600,000 worth of checks with Stout & Co.* Upon the Government's own axiom that the test of the incriminating nature of the compulsory testimony must be considered as of the time that it was given, there can be no question that those supplementary proceedings examinations were highly incriminating.**

Some allusion was made in the Government's brief, at page 19, to the effect that nothing in the case showed any reasonable ground for apprehension by petitioner at the time of his examinations of the institution of a criminal proceeding. The Government has evidently overlooked the fact that the record clearly shows that an agent of the Federal Bureau of Investigation of the Department of Justice was investigating the matter in July of 1939 (CR 1213) and that other agents of that same Department had commenced the investigation even prior to that time (CR 1150). That investigation specifically covered the Stout transactions as well as others. Moreover, the danger of state prosecution by reason of petitioner's check "kiting" activities clearly appeared even earlier (CR 592).

Thus, paraphrasing the test laid down by the Government in its own brief at page 19, it is clear that the sup-

* In view of the nature of the testimony extracted from the petitioner in the supplementary proceedings examinations subsequent to March of 1938, the recourse of the Government to the case of *Heike* v. *United States*, 227 U. S. 131 (pp. 26-27, Government Brief), as authority for an allegation that the present testimony was non-incriminating becomes palpably untenable upon comparison of the facts in the two situations. In the opinion in the *Heike* case, it was stated ". . . the evidence given in the former proceeding did not concern the present one and had no such tendency to incriminate the petitioner as to have afforded a ground for refusing to give it . . ." (p. 143). The supplementary proceedings examinations subsequent to March of 1938 were admitted in the trial court below to convict the petitioner; they were important and prejudicial evidence and were obviously incriminating *when given* in the light of the "kiting" situation that existed at that very time.

** Not only did they incriminate the petitioner under the mail fraud statute, but they equally incriminated him under the criminal statutes of the State of New York as set forth in New York Consolidated Laws (Cahill) C. 41, Sections 921, 925, 932, 938 and New York Penal Law, Section 1292(a).

plementary proceedings examinations subsequent to March of 1938 involved admissions of the commission of criminal offenses against both the State and Federal Governments and provided vital "elements"* and "links"** in the proof thereof. Although it is doubtful that the added requirement of apprehension of a criminal proceeding is necessary in order to furnish a witness the protection of the constitutional privilege, even that was present in this case.

It is further clear from petitioner's main brief, as well as from the facts hereinabove stated, that the testimony subsequent to March of 1938 was not cumulative and non-prejudicial. The Stout transactions in 1938-1939 (the "kiting" of checks at a time when petitioner had no funds or power to meet them) were clearly crimes under the New York State law and were obviously part of the scheme alleged in the subsequent federal mail fraud indictment. The supplementary proceedings testimony of 1938-1939 was highly relevant and essential as to those transactions. On the other hand, the 1936-1937 supplementary proceedings testimony pertained to the Essex House and Reynolds situation (1937) and not to petitioner's financial condition and actions one and one-half to two years later, to wit, when he gave his 1938-1939 testimony. Furthermore, the earlier testimony obviously could not and did not concern petitioner's actions in the Stout transactions in 1938-1939. There can, therefore, be no question but that the supplementary proceedings examinations subsequent to March of 1938 were not cumulative and their admission was, in fact, prejudicial.

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* *United States* v. *Weissman*, 111 Fed. (2d) 260, 262 (C.C.A., 2nd, 1940).

** *People ex rel. Coyle* v. *Truesdell*, 259 App. Div. 282, 284 (2nd Dept., 1940).

The Supplementary Proceedings Examinations Prior to March of 1938 Were Inadmissible

Inasmuch as petitioner has demonstrated that incriminating and prejudicial supplementary proceedings examinations subsequent to March of 1938, concededly compulsory, were admitted in evidence in violation of the petitioner's constitutional rights against self-incrimination, lengthy consideration of the Government's arguments with reference to the testimony taken prior to March of 1938 is unnecessary. Although petitioner's main brief clearly proves the inadmissibility thereof, some additional discussion may be helpful in indicating that the Government's position thereon is utterly untenable.

With respect to the testimony prior to March of 1938, the Government contends that the New York statute was defective, that petitioner, not having raised his state privilege, must be deemed to have given his testimony voluntarily. It is further claimed by the Government, at pages 12-13 of its brief, that petitioner had one privilege and that he waived it by testifying. The Government glibly glides over the logical legal hurdle that the petitioner could hardly have waived the privilege against self-incrimination under the Federal law, when, in fact, at the time that he testified in the State Court, he was unable to raise such a privilege.* The authorities presented as supporting such a doctrine of waiver are those holding that a person examined in one jurisdiction cannot refuse to testify on the ground that he might be incriminated in another jurisdiction. Those decisions do not hold that a person by so testifying waives his right to object to the

* *United States* v. *Murdock*, 284 U. S. 141. But in the federal court below, when petitioner had his first legal opportunity to object to its introduction, he did so.

use of that compulsory testimony when it is offered in that other jurisdiction.

Throughout the argument dealing with the admissibility of this testimony (pp. 13-15 of Government's brief), the alleged defectiveness of the immunity statute is stressed to such a degree that it is made to appear that it is a complete nullity. Nowhere is it mentioned,—indeed it seems to be studiously avoided—that, even prior to March of 1938, testimony in supplementary proceedings could not be used against the person so testifying.*

Wilson v. *United States*, 162 U. S. 613 (p. 14, Government's brief) and other such decisions involve waiver by voluntary testimony given where there was no statute prohibiting the testimony from being used in the future against the witness. The witness testifying under the circumstances of the *Wilson* situation did so well knowing (or at least he must in law be presumed to have known) that such testimony could be freely used against him in the future. Of course, such a witness thus waived the prohibition of the use of his testimony against him. But such a case has no application to the case at bar since here petitioner testified under the guarantee of the New York Statute that his testimony would not and could not be used against him.**

The Government contends that the testimony prior to March 1938 was "voluntary." This position is untenable. Analogy is readily available in the rules as to voluntary confessions. Confessions obtained by promises of im-

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* *People* v. *Carlson*, 222 App. Div. 54, 225 N. Y. Supp. 149 (4th Dept. 1927); *Matter of Doyle*, 257 N. Y. 244, 252 (1931).

** *People* v. *Carlson*, 222 App. Div. 54, 225 N. Y. Supp. 149 (4th Dept. 1927). This right arose automatically by testifying and did not have to be specifically claimed. In 1943, an amendment to the Civil Practice Act, Section 789 was passed by the Legislature so that today the immunity must be specifically claimed (1943 Session Laws, ch. 335). However, that amendment does not affect the case at bar.

munity* or by promises of preferential treatment,** or even by the promise not to use the confession against the defendant in the future*** are inadmissible because they are involuntary. It can hardly be argued that testimony secured under the promise and guaranty of a statute that it will not be used against the witness in the future is any less involuntary.****

Therefore, even as to the supplementary proceedings testimony taken prior to March of 1938, the petitioner's rights under the self-incrimination clause of the Fifth Amendment were violated by their introduction in evidence in the Federal Court below.

The Constitutional Question

Having devoted the major portion of its argument to other matters, in an attempt to escape consideration of the basic legal problem presented, the Government in the final one-third of its brief, at last and reluctantly, approaches the constitutional question involved in the case at bar and upon which the writ of certiorari was granted.

Much emphasis is placed upon the alleged legal doctrine that the privilege against self-incrimination applies primarily to *present* testimonial compulsion (see p. 40, Government's brief). The emphasis which is placed upon

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* *Austine* v. *People*, 51 Ill. 236, 239 (1869); *State* v. *Hunter*, 181 Mo. 316, 336 (1904); *Draughn* v. *State*, 76 Miss. 574 (1898).

** *Commonwealth* v. *Taylor*, 5 Cush. 605, 610 (Mass., 1850); *State* v. *White*, 316 Mo. 576 (1927); *Caudle* v. *State*, 116 Tex. Cr. 4, 33 S. W. (2) 438 (1930); *State* v. *Dena*, 28 N. M. 479 (1923).

*** *Couley* v. *State*, 12 Mo. 462 (1849).

**** Compare the case wherein it has been held that a person who does not object to an illegal search of his premises by a police officer or other law enforcing agent does not "consent" to such search and seizure so as to make it legal, but, at most, "acquiesces" or, in effect, bows to lawfully constituted authorities. *Amos* v. *United States*, 255 U. S. 313, 316 (1921); *Farris* v. *United States*, 24 F. (2) 639 (C.C.A., 9th, 1928); *United States* v. *Rembert*, 284 F. 996, 998 (1922); *United States* v. *Sussser*, 270 F. 818 (D. C., Ohio, 1921).

"present" would seem to be an unwarranted and self-serving addition to the usually accepted definition of the privilege. The citation from Wigmore's Treatise on Evidence (footnote 49) does not bear out any such limitation.

The case of *Regina* v. *Scott*, Dearsly & Bell's Crown Cases 47, is treated at length (pp. 40-43), and the decision of that English Court is advanced as determinative of the proposition in the case at bar. It is contended that the *Scott* case established the proposition that incriminating testimony lawfully compelled in the first instance may thereafter be used against a party freely. The Solicitor General than argues inferentially that, since New York State could lawfully compel the petitioner to testify compulsorily by virtue of a valid immunity statute, the *Scott* decision is authority that such testimony may be used against him subsequently. It admittedly could not be used against petitioner by the People of the State of New York. The authority of *Regina* v. *Scott* for the use by the Federal Government of the examinations in the case at bar is completely and finally demolished by recognition of the fact that the *Scott* decision and others of its type abolished the privilege against self-incrimination in England in bankruptcy matters. In the words of Professor Wigmore, those decisions had driven "a coach and four through the privilege."*

The Canadian cases cited in the brief for the United States as buttressing *Regina* v. *Scott*, also fall by the wayside in the light of the fact that Canada by statute has, in effect, abolished the privilege against self-incrimination.**

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* Wigmore *on Evidence* (3rd Ed.), Section 2260, page 357, (discussing *Regina* v. *Scott*, *supra* and *Regina* v. *Erdheim*, 2 Q. B. 260 (1896), cases cited by the Government at page 42 of its brief, footnote 52). In that same section of Wigmore it is also indicated that the statute of 1883 later expressly nullified that privilege in bankruptcy matters.

** Wigmore *on Evidence* (3d Ed.), Section 2281, footnote 11 and Section 2252, footnote 3.

It can hardly be claimed that the privilege against self-incrimination has been abolished in the United States although a ruling in the case at bar that the compulsory incriminating testimony elicited in the New York State courts may be used against the petitioner in the Federal court in a criminal case to secure his conviction will go a long way toward achieving that effect. As long as the privilege against self-incrimination remains a part of the Constitution of the United States the *use* in a Federal court of compulsory testimony, to secure the conviction and punishment of a defendant, is an obvious and gross violation of that privilege.*

The cases cited in footnote 53, page 43, of the Government's brief, arose out of an illegal search and seizure under the Fourth Amendment. The latter has a background and history different from that of the Fifth Amendment involved in the case at bar**. Furthermore, in the illegal search and seizure cases, the defendant remains passive and the constable blunders. It was the reluctance of this Court to permit the blunder of an official of another jurisdiction to penalize the federal prosecution that resulted in the decisions cited by the Government. Moreover, books, records, papers and con-

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* It has been pointed out many times that the root of the privilege sprang from the objection to convicting and punishing persons by the use of their compulsory testimony. See Frank, J., in *United States v. St. Pierre*, 132 Fed. (2d) 837, at p. 842, wherein he stated: ". . . the danger of punishment is at the heart of the privilege." And again: "The Puritans, who insisted that the oath ex officio was unlawful, considered it no disgrace to commit the crime of heresy; they were proud of their heresy; if, without fear of punishment, they could have confessed to what the law denounced as heretical acts, they would have been glad to do so. What they sought to avoid in their attacks on the procedure of the High Commission was punishment for violation of a substantive law which they considered abhorrent." See also Usher, *The Rise and Fall of the High Commission* (1913) at page 125, *et seq.*

** 8 Wigmore *on Evidence* (3d Ed.), Section 2264, pp. 368-9.

traband* are not testimonial in nature, although they may be evidentiary.

Thus we find that, in the illegal search and seizure cases, the defendant remains passive; the evidence obtained is not "testimonial." In the case at bar, however, petitioner was compelled to communicate his guilt affirmatively and in testimony given in court. It is a far cry to assert that the decision in the one case is determinative of the other. The present case could not present a clearer picture of a person compelled to be a "witness against himself."

The Government stresses the decision in *Fuller* v. *United States*, 31 Fed. (2d) 747 (C.C.A., 2nd) referred to at pages 36-40 of Government brief. That case involved the admission into evidence in a criminal case in the Federal court of books and records of the defendant theretofore obtained by the United States Government on subpoena from the Attorney General of the State of New York in whose possession they were. The Government, in the case at bar, contends that the *Fuller* decision is a direct holding in its favor in the present case. *Fuller* v. *United States* was, in fact, decided by the Circuit Court of Appeals of the Second Circuit and the case at bar arises under a writ to that same circuit. Nevertheless, neither the United States Attorney below nor the majority** nor minority of the Circuit Court below regarded its relevance and importance as sufficient to cite it. The *Fuller* decision simply falls within that class of cases represented by *Johnson* v. *United States*, 228 U. S. 457, and *Matter of*

* The case at bar, however, is that type of case where "testimony" in Court is obtained compulsorily by torture, force, coercion (or threat thereof) or by compulsory oath and that "testimony", incriminating the defendant, is used subsequently to secure his conviction.

** The Judge who wrote the majority opinion in the Circuit Court was a member of the very bench that decided the *Fuller* case.

Harris, 221 U. S. 274, and others cited by the Government at page 40 of its brief involving books and records whose lawful custody or title has passed to one other than the defendant. It is so cited by the numerous courts that have relied upon its authority.* The Court in the *Fuller* case devoted one short paragraph to its decision on this point and merely cited as authority the books and records cases.**

Besides, the books and records in the *Fuller* case were introduced at the trial in the federal court through a witness who identified them. Books and records are not testimony although they may be evidentiary. Wherein then lies the testimonial compulsion required for protection under the Fifth Amendment?*** But in the case at bar, can it be said that the examinations of the petitioner in the supplementary proceedings, taken under oath in the courts of the State of New York and admitted in the court below, were not *testimonial?* Certainly they did not become any less "testimonial" because they had been reduced to written form and were thus admitted into evidence in the court below. The Circuit Court of Appeals in the case at bar took some eighteen weeks to decide the

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* *Cravens* v. *United States*, 62 F. (2d) 261, 266 (C.C.A., 8th, 1932); *United States* v. *Hoyt*, 53 F. (2d) 877, 884, 885 (1931); *Newfield* v. *Ryan*, 91 F. (2d) 700, 705 (C.C.A., 5th, 1937). The Government in its brief in this court makes mention of the fact that there was an immunity statute present in the *Fuller* case. It does not mention, however, that the immunity statute in such case, unlike the one in the case at bar, required the witness affirmatively to claim his immunity, failing which the same would be waived (*General Business Law of the State of New York, Section 359*; see *Dunham* v. *Ottinger*, 243 N. Y. 423 at pp. 430-431). Further than that, the Circuit Court in deciding the *Fuller* case made no mention of, and gave no consideration to, the Immunity Statute or its effect.

** Note that the court also cited *Burdeau* v. *McDowell*, 256 U. S. 465, an illegal search and seizure case involving no testimonial compulsion and *Schenck* v. *United States*, 249 U. S. 47, which involved the seizure of documentary evidence upon a search warrant. Thus, the only cases cited for authority are books and records cases.

*** *People* v. *Defore*, 242 N. Y. 13 (1926), at p. 27. The Government cites this case with approval in its brief at pages 37 and 40.

instant case, admitted the lack of precise authority on the point and was evidently so unimpressed by the relevance and weight of its own prior decision in *Fuller* v. *United States* in relation to the problem of the case at bar that it did not even dignify its earlier decision by citing it.

Finally, it is difficult to understand how the Statute of 1868 (repealed in 1910), referred to at page 44 of Solicitor-General's brief, which was so broad in scope that it purported to prevent the subsequent use in *any* court of the United States of any testimony or *pleadings* previously given by a party or witness, whether incriminating or *non-incriminating*, can have any bearing on the question of whether the introduction of incriminating testimony secured compulsorily in the State of New York and thereafter offered in evidence in the Federal Court was a violation of the privilege against self-incrimination as set out in the Fifth Amendment to the United States Constitution. The history of that statute, its purpose and the reason for its repeal may be interesting, but its bearing upon the case at bar or upon the constitutional amendment remains obscure. Certainly its repeal cannot be determinative of the case at bar.

The Government, in its effort to convince this Court that there was no violation of the Fifth Amendment, has gone so far afield as to consider the possible effect of a statute repealed in 1910 and has strained, throughout its brief, to find precedents by analogy which, as pointed out above, do not apply. On the other hand, the Government has completely ignored any direct consideration of the Fifth Amendment itself and of its history and the morality

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*Cf. *Matter of Harris*, 221 U. S. 274. Moreover, in the petitioner's main brief at pages 26-29, he has already discussed that type of case cited by the Government at pages 48-51 of Government's brief involving reports as well as books and records.

and public policy involved in its enactment and enforcement. That Fifth Amendment to the United States Constitution and its violation in the case at bar is the sole issue before this Court because, as Judge Clark pointed out in his dissent below, the record clearly shows that "in plain fact he (the petitioner) was required to incriminate himself" (R 58). To this, the Government has, in fact, made no answer.

CONCLUSION

For the foregoing reasons we again respectfully submit that the judgment of the Circuit Court should be reversed.

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